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CHAPTER 12: THE NO CASE TO ANSWER SUBMISSION

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12.1 The introduction of the no case to answer submission in Scots law

At common law, it was open to a judge, when charging the jury, to direct them that there is no evidence in law to support a charge and that they are therefore obliged to return a verdict of not guilty.¹ The courts, however, rejected the argument that the accused should be entitled to move at the end of the Crown case for a charge to be dropped or withdrawn because the evidence led by the prosecution was insufficient.² In practice, such submissions were often made at the end of the Crown case where the defence did not intend to lead evidence, but this was with the consent of the Crown and technically incompetent.³

The question of whether such a submission should be introduced into Scots law was considered by the Grant Committee in its 1967 report on the work of the Sheriff Court. The Committee could not reach agreement on the matter – which was not obviously within its remit in any case, given that any change would logically have had to apply to all criminal courts – and made no recommendation.⁴

The matter was subsequently revisited by the Thomson Committee in its Second Report in 1975, when the introduction of a no case to answer submission was recommended:⁵

We share the view of those of our witnesses who think that the [existing] procedure places an unfair burden on the defence in that the decision on whether to lead evidence might prejudice the accused's case. We also agree with the minority of the Grant Committee who think that it is wrong that an accused who wishes to make a submission in law that the prosecution case has not been made out, should be required to peril his whole case on that submission, without the alternative, if it fails, of leading evidence on his own behalf. We consider unjustified the fears of some of our witnesses that the proposed procedure will result in delays arising from successful appeals by the prosecutor against decisions of no case to answer. Like the minority of the Grant Committee we take the view that this will occur in only a small number of cases and is unlikely to be a problem... In our opinion the balance of the argument is in favour of the introduction of a procedure in both solemn and summary cases giving the accused a right to submit that there is no case to answer at the end of the Crown evidence and if the submission is not upheld the right to lead evidence.

¹ *Kent v HM Advocate* 1950 JC 38. The common law submission remained available despite the introduction of a statutory no case to answer submission: see e.g. *HM Advocate v Purcell* [2007] HCJ 13. It is now regulated by statute: Criminal Procedure (Scotland) Act 1995 s 97A, as inserted by the Criminal Justice and Licensing (Scotland) Act 2010 s 73.

² *Kent v HM Advocate* 1950 JC 38 (solemn procedure); *McArthur v Grosset* 1952 JC 12 (summary procedure). In *McArthur*, Lord Justice-General Cooper noted (at 14) that it was open to a judge in summary procedure to indicate at the conclusion of the prosecution case that he was "dissatisfied and not prepared to accept the evidence", which would result in the prosecutor abandoning the prosecution in "nearly every case".

³ G H Gordon, *The Criminal Justice (Scotland) Act 1980* (1981) 38.

⁴ *The Sheriff Court* (Cmnd 3248: 1967) paras 695-699. The majority of the committee's members were in favour of the common law rule remaining unchanged.

⁵ *Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) para 48.05.

The submission was introduced into Scots law by the Criminal Justice (Scotland) Act 1980, permitting the trial judge to acquit the accused if the prosecution evidence was “insufficient in law to justify the accused being convicted”.⁶ This requires the judge to consider only whether there is a legal sufficiency of evidence. It is not open to the judge to consider whether that evidence is credible or should be accepted as true,⁷ or whether one interpretation of circumstantial evidence should be preferred over another.⁸

The no case to answer submission was examined by the Scottish Law Commission in its report on *Crown Appeals*.⁹ The Commission considered two questions in particular:

- First, should a judge be permitted to uphold a no case to answer submission on the basis that no reasonable jury, properly directed, could convict of the offence charged?¹⁰ By a majority, the Commission recommended that it should.¹¹
- Secondly, should it be possible for a no case to answer submission to result in the charges against the accused being amended? Under the law as it stands, this is not possible.¹² For example, take a case where X was charged with theft, and there is insufficient evidence at the end of the prosecution case to permit a conviction for theft, but sufficient evidence to permit a conviction for reset. As reset is a possible alternative verdict on a charge of theft, the no case to answer submission would fail entirely. In addition, if the defence evidence cured the deficiency in the prosecution case, a conviction for theft would be possible. By a majority, the Commission recommended that there should be no change to this rule.¹³

The government did not accept the first of these two recommendations, and the Criminal Justice and Licensing (Scotland) Act 2010 provided expressly that it is *not* open to a judge to uphold a submission on this basis.¹⁴

12.2 How would the submission operate in the absence of corroboration?

The Carloway Review made the following observations on the no case to answer submission, rejecting the suggestion that a trial judge should have the power to withdraw the case from the jury if it would be unreasonable for the jury to convict:¹⁵

If the requirement for corroboration were to be abolished, there is no need for any further change to the existing law on sufficiency of evidence at the trial stage. The issue for the trial

⁶ s 19, inserting ss 140A and 345A into the Criminal Procedure (Scotland) Act 1975.

⁷ *Williamson v Wither* 1981 SCCR 214.

⁸ *Fox v HM Advocate* 1998 JC 94.

⁹ Scottish Law Commission, Report on *Crown Appeals* (Scot Law Com No 212, 2008).

¹⁰ In a submission to the Commission, Sir Gerald Gordon indicated he understood that such a submission had in fact been made and sustained in at least one case. See Report on *Crown Appeals* (n 9) para 2.11.

¹¹ Scottish Law Commission, Report on *Crown Appeals* (n 9) para 2.25.

¹² Criminal Procedure (Scotland) Act 1995 s 97(1)(b).

¹³ Scottish Law Commission, Report on *Crown Appeals* (n 9) para 2.25.

¹⁴ Criminal Procedure (Scotland) Act 1995 s 97D (“A judge has no power to direct the jury to return a not guilty verdict on any charge on the ground that no reasonable jury, properly directed on the evidence, could convict on the charge.”), as inserted by Criminal Justice and Licensing (Scotland) Act 2010 s 73.

¹⁵ *The Carloway Review: Report and Recommendations* (2011) para 7.3.19.

judge would be the same as it is at present, except that there would be no need for corroboration.

In one sense, this is correct. The question for the trial judge would remain this: has a sufficiency of evidence been led?¹⁶ But the meaning of “sufficiency” would have radically changed, and the substantive question for the trial judge would be very different. The judge would no longer have to ask whether there was corroborated evidence in respect of every element of the offence. Instead, a no case to answer submission would succeed only if there were *no* evidence in respect of a material element of the offence, or the accused’s identity as the perpetrator.

12.3 No case to answer and directed verdicts in other jurisdictions

England and Wales

In English criminal law, the trial judge may stop the trial at the end of the prosecution case if there is no case to answer. The leading case on this power is *R v Galbraith*,¹⁷ where it was said that the trial judge should approach a submission of no case to answer as follows:¹⁸

(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness’s reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

The context of the “difficulty” referred to by the court in respect of case (2) was that since 1966 the Court of Appeal had been required to quash a conviction if “under all the circumstances of the case it is unsafe or unsatisfactory”.¹⁹ It seems that this led to a practice whereby counsel would invite the court to rule at the end of the prosecution case that a conviction on that basis would be unsafe or unsatisfactory, adopting the language of the test applicable in respect of an appeal against conviction.²⁰ The *Galbraith* court suggested that this might wrongly lead a judge to evaluate whether

¹⁶ In practice, a no case to answer submission will occasionally not be directed at a pure evidential deficiency, but will instead be a claim that what has been established by the prosecution evidence does not amount in law to the offence charged (see e.g. *McDougall v Dochree* 1992 JC 154; *Paterson v Lees* 1999 JC 159). This aspect of the submission is not relevant to the present discussion.

¹⁷ [1981] 1 WLR 1039.

¹⁸ At 1042 per Lord Lane CJ. Cf *Doney v R* [1990] HCA 51, where the High Court of Australia, without disputing the approach taken in *Galbraith*, noted (at para 13) that “there is some difficulty in reconciling proposition 2(a)... with proposition 2(b)”.

¹⁹ Criminal Appeal Act 1966 s 4(1)(a). See now Criminal Appeal Act 1968 s 2(1)(a): the court “shall allow an appeal against conviction if they think that the conviction is unsafe”.

²⁰ See *Galbraith* at 1040-1041.

or not the prosecution witnesses were telling the truth, something properly to be left to the jury.²¹ Nevertheless, in considering a case of type (2), it does appear to be permissible for a trial judge to uphold a no case to answer submission on the basis that the prosecution evidence is in a crucial respect inherently unreliable or self-contradictory and inconsistent.²²

In summary procedure, the court may, at the conclusion of the prosecution case, “acquit on the ground that the prosecution evidence is insufficient for any reasonable court properly to convict”.²³ In principle, questions of credibility are to be disregarded here except in the most clear-cut of cases,²⁴ although justices may pragmatically decide that it would be inappropriate to “go through the motions” of hearing defence evidence where the prosecution evidence would be insufficiently credible to warrant a conviction.²⁵ In contrast to trial on indictment, there is no risk of trespassing on the function of the jury by doing so.

Ireland

In Irish law, the trial judge can, following the conclusion of the prosecution case, direct the jury to acquit the accused.²⁶ The Irish courts have accepted that such submissions are to be dealt with applying the same general principles as are applicable in English law.²⁷

Australia

In *Doney v R*,²⁸ the High Court of Australia considered the *Galbraith* test and adopted a stricter approach to submissions of no case to answer, ruling that evidence capable of supporting a conviction should be left to the jury “even if tenuous or inherently weak or vague”.²⁹ The court rejected the argument that the power of the appeal court to quash unsafe or unsatisfactory convictions necessitated the trial judge having a corresponding power to halt a prosecution on a similar basis:³⁰

It is necessary only to observe that neither the power of a court of criminal appeal to set aside a verdict that is unsafe or unsatisfactory nor the inherent power of a court to prevent an abuse of process provides any basis for enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is

²¹ At 1041-1042.

²² See e.g. *R v Shippey* [1998] Crim LR 767, where it was famously said that the obligation to take the prosecution case at its highest does not mean “picking out the plums and leaving the duff behind”; *R v Shire* [2001] EWCA Crim 2800.

²³ Criminal Procedure Rules r 37.3(3)(c)(ii). The court may do so on the defendant’s application or of its own motion.

²⁴ *R v Barking and Dagenham Justices, ex p DPP* (1995) 159 JP 373 (QBD).

²⁵ Lord Justice Hooper and D Ormerod (eds), *Blackstone’s Criminal Practice* 2011 (2010) D21.43.

²⁶ V Conway, Y Daly and J Schweppe, *Irish Criminal Justice: Theory, Process and Procedure* (2010) para 8-38.

²⁷ *DPP v McManus* [2011] IECCA 32.

²⁸ [1990] HCA 51. See also the review of authorities by Bellew J in *R v Paterson (No 4)* [2014] NSWSC 162 at paras 80-83.

²⁹ *Doney* at para 17. It has been suggested that the *Galbraith* approach is nevertheless appropriate for non-jury trials: M Bagaric, *Ross on Crime*, 6th edn (2013) para 14.1100.

³⁰ At para 18 (citations omitted).

supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial. Nor does the existence in a trial judge or a court of powers to stay process or delay proceedings where the circumstances are such that the trial would be an abuse of process.

Canada

In Canadian law, a judge may withdraw the case from the jury³¹ if the prosecution have not led evidence upon which a reasonable jury, properly instructed in law, could bring in a verdict of guilty.³² The judge may not, as part of that process, consider the reliability of the evidence – this would be regarded as trespassing on the function of the jury – and so the judge is not empowered to withdraw a case on the basis that the evidence is “manifestly unreliable”.³³ Instead, the judge must ask whether there is some evidence going to every element of the offence.³⁴ If there is, withdrawal of the case would be inappropriate.

New Zealand

Under the Criminal Procedure Act 2011, the court may dismiss a charge if, in a jury trial, “as a matter of law, a properly directed jury could not reasonably convict the defendant” or, in judge-alone procedure, if there is “no case to answer”.³⁵ In judge-alone procedure, this means that the judge must ask “whether, on the evidence before the court, [they] could find the offence proved beyond reasonable doubt”.³⁶

South Africa

Section 174 of the Criminal Procedure Act, 1977 provides as follows:

If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

Although the statutory provision refers to “no evidence”, the courts have interpreted this as meaning “insufficient evidence for a reasonable man to convict upon”.³⁷ The credibility of evidence

³¹ Formerly the judge would direct the jury to acquit, but the procedure changed following the decision of the Supreme Court of Canada in *R v Rowbotham*; *R v Roblin* [1994] 2 SCR 463.

³² *United States of America v Shephard* [1997] 2 SCR 1067.

³³ *Shephard* at 1087 per Ritchie J.

³⁴ The case law on this point is extensive: see M C Plaxton, “Thinking about appeals, authority and judicial power after *R v Sheppard*” (2002) 47 Crim LQ 59 at 60-61.

³⁵ s 147(4). If a charge is dismissed, the defendant is deemed to be acquitted on that charge: s 147(6). This replaces the power to discharge an accused under s 347 of the Crimes Act 1961.

³⁶ J Finn, D Mathias and R Mansfield, *Criminal Procedure in New Zealand* (2013) para 9.3.1(1).

³⁷ *S v Shuping* 1983 2 SA 119 (BSC) at 120, quoting (in English) from *S v Khanyapa* 1979 (1) SA 824 (A) at 838 (itself in Afrikaans).

is relevant at this stage only to the extent that evidence may be ignored if “it is of such poor quality that no reasonable person could possibly accept it”.³⁸

In the same case where that test was formulated, however, it was said that the court could decline to return a verdict of not guilty if, despite the evidential deficiency, there is “a reasonable possibility that the defence evidence might supplement the State case”.³⁹ This discretion was initially recognised when preparatory examinations were regularly held in Supreme Court cases, potentially providing the court with information from which such a conclusion might be drawn.⁴⁰ In the absence of a practice of this nature, there is likely to be limited room for a trial judge to exercise a discretion of this nature. In recent years, the discretion has been the subject of a number of decisions⁴¹ which appear to have moved towards the proposition that the court is obliged to discharge the accused “if there is no possibility of a conviction other than if he enters the witness box and incriminates himself”.⁴²

United States of America

In *Jackson v Virginia*,⁴³ the US Supreme Court held that the constitutional guarantee of due process prohibits conviction “except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense”.⁴⁴ It is not enough simply to direct the jury on the reasonable doubt standard: there must be a mechanism for challenging the sufficiency of the evidence. While such challenges may be dealt with on appeal, “[a]most all [US] jurisdictions provide for a motion for judgment of acquittal that can be presented at the end of the prosecution’s case, at the end of the presentation of evidence by both sides, and after the discharge of the jury”.⁴⁵

Because *Jackson* was not concerned directly with directed acquittals, it did not discuss what the test should be, but it suggested that the “prevailing criterion” in federal trials was to ask whether “‘reasonable’ jurors ‘must necessarily have a reasonable doubt’ as to guilt”.⁴⁶

³⁸ *S v Mpetha* 1983 4 SA 262 (C) at 265.

³⁹ *Shuping* at 121.

⁴⁰ See *Shuping* at 120, discussing *R v Krizinger* 1952 (2) SA 401 (W).

⁴¹ The case law is reviewed by P J Schwikkard and S E van der Merwe, *Principles of Evidence*, 3rd edn (2008) 564-569.

⁴² *S v Lubaxa* 2001 2 SACR 703 (SCA), as quoted by Schwikkard and van der Merwe, *Principles of Evidence* (n 41) 567. This leaves open the possibility of refusing a discharge if there is a possibility that a *co-accused* might correct the deficiency in the prosecution case. There must, however, be some reasonable basis for anticipating that the co-accused might do so: see P J Schwikkard, “Arrested, detained and accused persons”, in I Currie and J De Waal, *The Bill of Rights Handbook*, 6th edn (2014) 744 at 768, citing *S v Nkosi* 2011 (2) SACR 482 (SCA).

⁴³ 443 US 307 (1979).

⁴⁴ At 316. This, it said, was a consequence of the prohibition on convicting any person without proof beyond reasonable doubt, as articulated in *In re Winship* 397 US 358 (1970).

⁴⁵ W R LaFave and others, *Criminal Procedure*, 5th edn (2009) 1167.

⁴⁶ *Jackson* at 318 n 11, citing *Curley v United States* 160 F. 2d 229, 232-233 (CA DC 1947). An earlier survey had found “[r]ather varied standards” in the various states which permitted directed acquittals: R H Winningham, “The dilemma of the directed acquittal” (1962) 15 Vanderbilt LR 699 at 705.

12.4 Analysis

The above review of practice in other jurisdictions suggests that, in the absence of a corroboration requirement, the Scottish no case to answer submission would be comparatively weak. It would not be unique, however, being broadly similar to the position taken in Australia and Canada, which generally restrict such submissions to cases where there is simply no evidence against the accused in respect of a crucial element of the prosecution case.

One difficulty in this area is that the *purpose* of the no case to answer submission is surprisingly obscure. While it is consistently found across the major common law jurisdictions, discussion of it generally focuses on the test to be applied, with little said about the underlying rationale. It is sometimes characterised as a safeguard against wrongful conviction,⁴⁷ but if the submission existed solely to prevent the conviction of the factually innocent, there would be no reason to locate it at the end of the prosecution case rather than at the end of the trial as a whole.

A better explanation is suggested by the Thomson Committee's report, where it was said that the submission would avoid the accused being placed in the difficult position of having to choose between periling his entire case on a submission that the evidence was insufficient to convict, or leading evidence on his own behalf.⁴⁸ Difficult as such a choice may be, the Thomson Committee's account does not explain why it must be avoided. An answer is suggested by the Canadian case of *R v P (MB)*,⁴⁹ where it was held that the trial judge had erred in allowing the Crown to reopen its case after the defence had announced its intention, following the close of the Crown case, to call certain witnesses. The Chief Justice of Canada (Lamer CJ) explained the principle underlying the court's decision as follows:⁵⁰

Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.

Although the accused is not compellable as a witness, and need not lead any evidence at all, the progress of a prosecution beyond the close of the prosecution case represents a very real form of compulsion on the accused to answer the allegations made against him or her. It is therefore wrong that such compulsion should be placed on the accused unless there is evidence to support the allegations which have been made.⁵¹ On this account, the protection against wrongful conviction which the submission offers remains real, but is incidental to its primary purpose.

⁴⁷ See e.g. Scottish Law Commission, Report on *Crown Appeals* (n 9) para 2.15, although the point is suggested rather tentatively; Scottish Government, *Reforming Scots Criminal Law and Practice: Additional Safeguards following the Removal of the Requirement for Corroboration* (2012).

⁴⁸ See above ch 12.1.

⁴⁹ [1994] 1 SCR 555.

⁵⁰ At para 37 (citations omitted).

⁵¹ See also R K Greenawalt, "Silence as a moral and constitutional right" (1981) 23 William and Mary LR 15.

Should the no case to answer submission be broadened?

This understanding sheds light on the test which should be applied. If it is wrong to call a person to account on the basis of no evidence, it is equally wrong to call a person to account on the basis of evidence which is utterly incredible of belief. While it might be suggested that it would trespass on the function of the jury for a judge to consider the credibility of evidence in solemn procedure, this misrepresents the function performed by the no case to answer submission. The judge is not being asked to consider the accused's guilt or innocence, but instead to consider whether the state has put forward a case which the accused can fairly be called to answer.

This need not involve any significant broadening of the current no case to answer submission. Just as appeals on the ground that a jury's verdict was unreasonable are only very exceptionally successful,⁵² successful no case to answer submissions relating to the quality or credibility of the evidence would succeed only in very unusual cases.

If the submission is broadened, what test should be applied?

While the *Galbraith* test in England allows the trial judge to go beyond the question of whether there is no evidence in respect of a material element of the prosecution case, the extent to which it does so is unclear and appears to have proved difficult to apply in practice. The tests applicable in New Zealand, set out above,⁵³ seem most clearly suited to avoid this uncertainty. They are consistent with an extremely limited role for the trial judge in assessing the quality or credibility of evidence: as in South Africa, taking this into account only when the relevant evidence is so poor that it could not possibly be accepted by any reasonable person. They also recognise that in summary procedure, where there is no question of the jury's province being trespassed on, it is legitimate and pragmatic to give the judge greater scope to consider these issues.

12.5 Issue for consideration

It is suggested that the Review should consider whether a judge should be empowered to uphold a submission of no case to answer if, in solemn procedure, he or she considers that as a matter of law, a properly directed jury could not reasonably convict the accused; and in summary procedure, if, on the evidence led by the prosecution, he or she could not find the offence proved beyond reasonable doubt.

Section 97A of the Criminal Procedure (Scotland) Act 1995 permits the accused in solemn procedure, after the close of the whole of the evidence or the conclusion of the prosecutor's address to the jury, to submit that the evidence is insufficient in law to justify his conviction. If the suggestion above is accepted, it would seem logically to follow that section 97A (and, consequentially, section 97B) should be amended to refer to a submission that no properly directed jury could reasonably convict on the evidence led.

⁵² See F Leverick, "The return of the unreasonable jury" (2007) 11 Edin LR 426; F Stark, "A perfectly unreasonable decision" (2012) 16 Edin LR 86.

⁵³ See above ch 12.3.